# Petition

81-1943

Office - Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1981

EWELL WALTER EVANS, SR.,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

**Petition for a Writ of Certiorari To the United States Court of Appeals for the Eleventh Circuit**

John C. Falkenberry

STEWART, FALKENBERRY & WHATLEY
2017 Morris Avenue
Birmingham, AL 35203
(205) 323-8300

## QUESTION PRESENTED

Is the mailing of title applications from an independent finance company to the State of Alabama sufficient to support a conviction of mail fraud under 18 U.S.C. § 1341 against a car dealer selling cars with "rolled-back" odometers

(a) when the mailing occurred after customers had purchased cars containing the "rolled-back" odometers,

(b) when Congress has passed a specific criminal statute punishing the rolling back of odometers, and

(c) when there is no proof that defendant/petitioner was familiar with the procedure for obtaining automobile titles in Alabama?

## TABLE OF CONTENTS

*Page*

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 3

CONCLUSION ..... 5

APPENDIX

Motion for Leave to File Petition For Rehearing Out of Time ..... A-1

Petition for Rehearing ..... A-4

Motion for Acquittal (treated as such under Rule 29) and ruling of the District Court ..... A-9

## CITATIONS

Cases: *Page*

*United States v. Shryock*, 537 F.2d 207 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977) ..... 3

*United States v. Maze*, 414 U.S. 395 (1974) ..... 3, 4

*Parr v. United States*, 363 U.S. 370 (1960) ..... 3

*Kann v. United States*, 323 U.S. 88 (1944) ..... 3, 5

*United States v. Ballard*, 663 F.2d 534, 544 (5th Cir. Unit B 1981) ..... 4

*United States v. Foshee*, 569 F.2d 401 (5th Cir. 1978) ..... 4

*United States v. Johnson*, 547 F.2d 282 (5th Cir. 1977) ..... 4

*Younger v. Harris*, 401 U.S. 37 (1971) ..... 5

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1981

EWELL WALTER EVANS, SR.,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

**Petition for a Writ of Certiorari To the United States Court of Appeals for the Eleventh Circuit**

## OPINIONS BELOW

What was treated as a motion for acquittal under Rule 29, Federal Rules of Criminal Procedure, and the ruling by the District Court are not reported but are reprinted at App. 9-12 (pages 9-12 of the Appendix to this petition). The opinion of the United States Court of Appeals for the Eleventh Circuit issued November 25, 1981, is not reported.[1] Petitioner then filed a motion for leave to file petition for rehearing out of time at App. 1, and a petition for rehearing at App. 4. The Court of Appeals denied petitioner's motion without opinion on February 17, 1982.

## JURISDICTION

On November 25, 1981, the United States Court of Appeals for the Eleventh Circuit affirmed petitioner's con-

[1]This opinion is not included in the Appendix because it does not address the issues raised in this petition.

viction on three counts of mail fraud, 18 U.S.C. § 1341. Petitioner filed a motion for leave to file a petition for rehearing out of time and a petition for rehearing, but the motion was denied on February 17, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## STATEMENT OF THE CASE

Petitioner, Ewell Walter Evans, Sr., was indicted on nine counts of mail fraud, 18 U.S.C. § 1341, on March 10, 1981. Each of the alleged schemes involved the rolling back of odometers on used cars. Petitioner was tried before a jury on May 11 and 12, 1981. At the close of the Government's evidence, petitioner made an oral motion, which was treated as a motion for acquittal. App. 9. The Court, on its own motion, questioned whether there was any proof of mail fraud. App. 10. Nevertheless, the Court allowed the case to go to the jury and petitioner was convicted on three of the nine counts of mail fraud. Even though he had served no prior time in prison, petitioner was sentenced to five years imprisonment on each count, each sentence to run concurrently. Petitioner appealed, but did not raise the issue of the sufficiency of the mailing, and the appeal was affirmed on November 25, 1981. On December 29, 1981, petitioner mailed to the Court of Appeals a motion for leave to file petition for rehearing out of time to raise the issue of the sufficiency of the mailing. App. 1. On February 4, 1982, prior to receiving any response to his motion, petitioner mailed a petition for rehearing. On February 17, 1982, the Court of Appeals denied the motion[2] and on March 15, 1982, the mandate was issued.

[2]Due to a failure to include petitioner's new attorney on the docket sheet in the Court of Appeals, neither petitioner nor his attorney received notice of the denial until after issuance of the mandate.

## REASONS FOR GRANTING THE WRIT

### 1. SINCE CONGRESS HAS PASSED A SPECIFIC CRIMINAL STATUTE MAKING THE UNDERLYING SCHEME WITH WHICH PETITIONER WAS CHARGED A MISDEMEANOR, THE FEDERAL MAIL FRAUD STATUTE SHOULD NOT BE EXPANDED TO CONVERT THE SCHEME INTO A FELONY.

Congress has enacted a specific criminal statute concerning rolling back odometers on automobiles, 15 U.S.C. § 1990c. A violation of that statute is a misdemeanor.

The scheme with which petitioner has been charged involved rolling back odometers, the specific concern of 15 U.S.C. § 1990c. Nevertheless, the Government has "bootstrapped" that misdemeanor scheme into a felony because of an independent finance company mailed applications for titles to the State, after the odometers had been rolled back and after those allegedly defrauded had purchased the automobiles.

The Court of Appeals refusal to consider the issue of the mailing in this case follows *United States v. Shryock*, 537 F.2d 207 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977), a case with facts similar to those in this case.[3]

This Court has ruled on several occasions that the federal mail fraud statute is not designed to reach all frauds. *United States v. Maze*, 414 U.S. 395 (1974); *Parr v. United States*, 363 U.S. 370 (1960); *Kann v. United States*, 323 U.S. 88 (1944). Since Congress has specifically addressed the scheme with which petitioner was charged and has made

[3]There are some distinguishing factors because until recently automobiles had no title certificates in Alabama, and models prior to 1975 still have no title certificates. Code of Alabama 1975 § 32-8-30. Also, petitioner had only recently moved to Alabama, and there is no evidence that he knew that the title procedure would result in a mailing of any kind.

the scheme a misdemeanor, this Court should overrule *Shryock* and this case, and declare that the federal mail fraud statute does not reach a scheme involving rolling back odometers.

## 2. THIS COURT SHOULD CLOSELY MONITOR THE APPLICATION OF THE FEDERAL MAIL FRAUD STATUTE BECAUSE OF THE JUSTICE DEPARTMENT'S CONSISTENT ATTEMPTS TO EXTEND THE SCOPE OF THAT STATUTE.

Even since this Court denied certiorari in *Shryock*, the Justice Department has made consistent efforts to extend the scope of the federal mail fraud statute. For example, the Justice Department recently tried to fill what it felt to be a gap in the federal energy laws with the federal mail fraud statute. In that case, the Court of Appeals "refuse[d] to over-extend the mail fraud statute to fill in the gaps in the regulatory scheme passed by Congress." *United States v. Ballard*, 663 F.2d 534, 544 (5th Cir. Unit B 1981).

However, in many other instances the Courts of Appeals have allowed the Justice Department to extend the mail fraud statute. For example, a check-kiting scheme has been held to be mail fraud. *United States v. Foshee*, 569 F.2d 401 (5th Cir. 1978); *United States v. Johnson*, 547 F.2d 282 (5th Cir. 1977).

In light of the continued attempts to expand the scope of the mail fraud statute, this Court should closely monitor mail fraud prosecutions and convictions to ascertain that they are staying within the limits most recently set forth in *Maze*.

In so monitoring the federal mail fraud statute, this Court should remember that by reversing mail fraud convictions, it is not releasing alleged perpetrators of fraud

from any possible criminal responsibility. In addition to the federal odometer criminal statute which covers the scheme herein, State criminal laws can be used to punish fraudulent schemes. *Kann v. United States,* 323 U.S. 88, 95 (1944). Almost every time the scope of the federal mail fraud statute is extended, the federal courts trespass into what was previously the exclusive territory of the state courts and thereby change the balance so important to our system of federation. See *Younger v. Harris,* 401 U.S. 37 (1971).

## CONCLUSION

For the reasons stated herein, this Court should grant the petition for certiorari and thereafter reverse petitioner's convictions for mail fraud.

Respectfully submitted,

JOE R. WHATLEY, JR.

STEWART, FALKENBERRY & WHATLEY
2017 Morris Avenue
Birmingham, AL 35203

# Appendix

## APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

UNITED STATES OF AMERICA
Appellee

v. No. 81-7431

EWELL WALTER EVANS, SR.
Appellant

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

---

### MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

Appellant Ewell Walter Evans, Sr., hereby moves for leave to file a petition for rehearing out of time, based on the following:

1. On May 12, 1981, appellant was convicted on three counts of mail fraud under 18 U.S.C. § 1341. Appellant was sentenced for five years on each count, said sentences to run concurrently. Appellant's counsel at the time filed the notice of appeal, which was denied in late November, 1981. Appellant learned that the appeal had been denied approximately one week prior to Christmas.

2. Appellant came to the undersigned counsel for the first time on the afternoon of Monday, December 28, 1981.

The undersigned reviewed the transcript of appellant's trial and discovered that there was a serious question as to whether the mailings were sufficient to support a conviction under 18 U.S.C. § 1341. In fact, the Trial Court, on its own motion, expressed concern as to whether the mailings were sufficient. (Tr. 162-165).

3. All of appellant's convictions involve alleged schemes to roll back odometers on used cars which were then sold. The mailings which the Government relied upon occurred after the sale of the cars and were from a finance company to the State of Alabama. Under the tests set out in the Supreme Court's most recent treatment of the Federal Mail Fraud Statute, *United States v. Maze*, 414 U.S. 395 (1974), such mailings cannot support convictions for mail fraud because the mailings occurred after the completion of the alleged scheme and were not "a part of the execution of the fraud." It is important to recognize in this and all mail fraud prosecutions that 18 U.S.C. § 1341 is not designed to reach all frauds, "but only those limited instances in which the use of the mails is a part of the execution of fraud, leaving all other cases to be dealt with by appropriate State law." *Kann v. United States*, 323 U.S. 88, 95 (1944). See also *Parr v. United States*, 363 U.S. 370 (1960). In a case which is now applicable in this Circuit, the United States Court of Appeals for the Fifth Circuit specifically rejected the theory that "a mailing somehow related to an aspect of the scheme brings the scheme within the scope of the mail fraud statute." *United States v. LaFerriere*, 546 F.2d 182, 186 (5th Cir. 1977).

4. This issue of whether appellant had engaged in "mail fraud" was not raised in the original appeal. Thus, unless this motion is granted, appellant will be denied the opportunity to raise the crucial issue of the sufficiency of the mailings to support three mail fraud convictions.

5. Since the undersigned counsel have had less than twenty-four hours in which to review and research this matter, they need at least ten days in which to prepare a petition for rehearing and a supporting brief.

WHEREFORE, appellant requests leave of Court for ten days in which to file a petition for rehearing out of time.

Respectfully submitted this 29th day of December, 1981.

STEWART, FALKENBERRY & WHATLEY
2017 Morris Avenue
Birmingham, AL 35203
205/323-8300

By /s/ JOE R. WHATLEY, JR.
JOE R. WHATLEY, JR.

/s/ JOHN C. FALKENBERRY
JOHN C. FALKENBERRY

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing motion has been served on David L. Allred, Assistant United States Attorney, P.O. Box 197, Montgomery, Alabama, 36101 by depositing same in the United States Mail, postage prepaid, this 29 day of Dec., 1981.

/s/ JOE R. WHATLEY, JR.

## STATEMENT OF FACTS

Petitioner was convicted of nine counts of mail fraud, 18 U.S.C. § 1341, for an alleged scheme to roll back odometers on used cars which were then sold. The mailing which the government relied upon was that of the application for title from the finance company to the State of Alabama. The mailing occurred after the purchaser of each car had agreed to purchase the car and had arranged financing.

The testimony related to mailings was extremely limited in this case.

Alan Dillinger of Transouth Financial Corporation testified that after title application had been brought to him, he mailed the applications to the State of Alabama (Tr. 87). Dillinger did not testify that he ever told petitioner that the title applications were being mailed.

Michael Harper of the State of Alabama, testified that his office received the applications for title, made a review of them, and issued certificates of title (Tr. 88-89). He did not testify that his office mailed anything. He also did not testify that petitioner was aware of the review procedure or of any mailing.

Although petitioner did not testify in this case, an F.B.I. agent read a statement from petitioner to the jury. According to the statement, petitioner had been in the used car business in Georgia for a number of years. In December of 1979, petitioner moved from Georgia to Alabama and, according to the United States, then participated in the scheme to roll back odometers for a period of almost a year.

There is no evidence that petitioner was aware of any mailing or that he was aware of the procedure for obtaining and issuing automobile titles in the State of Alabama.

## ARGUMENT

### THE MAILING WAS NOT SUFFICIENT TO SUPPORT A CONVICTION OF MAIL FRAUD IN THIS CASE.

Congress has enacted a specific criminal statute for rolling back odometers, 15 U.S.C. 1990c. A violation of this statute is a misdemeanor. However, the Government went further than the specific statute and charged petitioner with twelve counts of mail fraud under 18 U.S.C. § 1341, which are felonies.

The federal mail fraud statute, 18 U.S.C. § 1341, is not designed to reach all frauds, "but only those limited instances in which the use of the mails is a part of the execution of fraud, leaving all other cases to be dealt with by approximate State law." *Kann v. United States,* 323 U.S. 88, 95 (1944). See also *Parr v. United States,* 363 U.S. 370 (1960). Courts have rejected the theory that "a mailing somehow related to an aspect of the scheme brings the scheme within the scope of the mail fraud statute." *United States v. LaFerriere,* 546 F.2d 182, 186 (5th Cir. 1977).

To convict a person for mail fraud, the Government must prove the "use of the mails 'for the purpose of executing the scheme.' " *United States v. Knight,* 607 F.2d 1172, 1175 (5th Cir. 1979), quoting *Kann v. United States, supra* at 94. Under the test set out in the Supreme Court's most recent treatment of the mail fraud statute, a mailing cannot support a conviction for mail fraud if the mailing occurs after the completion of the scheme and was not "a part of the execution of the fraud." *United States v. Maze,* 414 U.S. 395, 399 (1974).

There have developed some limited instances where a mailing after the completion of a scheme will support a conviction for mail fraud. One such instance is where the

mailing has a "lulling" effect which prevents the detection scheme long enough for the scheme to succeed or for its perpetrator to escape.[1] Another example is a check-kiting scheme where "the fraud depended on the delay of the check-clearing process . . ." caused by the mails. *United States v. Johnson,* 547 F.2d 282, 284 (5th Cir. 1977).

Another example of such a limited instance is *United States v. Shryock,* 537 F.2d 207 (5th Cir. 1976), which also involved an altered odometer and the mailing of title papers. However, that case involved some distinguishing facts. Here, petitioner had just moved into the State of Alabama. Since there is no evidence that he had any familiarity with the title application process in Alabama, there is no evidence from which one could infer that he knew a mailing would be involved. In fact until recently, automobiles had no title certificates in Alabama, and models prior to 1975 still have no title certificates. Code of Alabama 1975 § 32-8-30.

Finally, even the Trial Court questioned whether the Government had proven the charges of mail fraud. (JR 162 *et seq.*) The reaction of the Trial Court demonstrates the lack of evidence to support the adequacy of the mailing.

---

[1]An example of the kind of proof required in such cases is in *United States v. Ashdown,* 590 F.2d 793, 800 (5th Cir. 1975), where a number of witnesses testified "to the 'lulling' effect of the mailing."

## CONCLUSION

For the reasons stated herein, the petition for rehearing should be granted and the convictions reversed.

Respectfully submitted,

STEWART, FALKENBERRY & WHATLEY
2017 Morris Avenue
Birmingham, Alabama 35203

By /s/ JOE R. WHATLEY, JR.
JOE R. WHATLEY, JR.

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition has been served on David L. Allred, Assistant U.S. Attorney, P.O. Box 197, Montgomery, Alabama 36101, by depositing same in the U.S. Mail, postage prepaid, this 4 day of February, 1982.

/s/ JOE R. WHATLEY, JR.

## APPENDIX C

BY THE COURT: All right, Mr. Morris?

BY MR. MORRIS: Judge, at this time I would like to make a motion to exclude the Government's evidence dealing with Mr. Evans, Sr., and grounds for that, as I understand the law, the uncorroborated testimony of a defendant can not alone convict him, and certainly not be a prima face case. I would earnestly insist to the Court that the only evidence, in light of the fact that no evidence put on by the State, is that he was an employee, — by the Government, that he was an employee, or everything that's been brought up shows that he was totally disassociated from this company. Other than one thing, and that's his uncorroborated testimony. Based upon that, Your Honor, we believe very strongly that the Government, unless they produce some tie-ups to this man with this business, and it has been established unequivocally that the business is in someone else's name, it has not been established that he is an employee, or performed any business whatsoever. The best one witness that they put on that would even shed any light whatsoever of a centilla of that was Mr. Huntley, he said he rode from the Auto Center some two blocks to Transouth. We know that no one else was there, and I just feel very strongly that this uncorroborated testimony is not sufficient for a prima facie case.

BY THE COURT: Mr. Allred?

BY MR. ALLRED: First of all, an uncorroborated defendant's confession is sufficient in federal Court. That is sufficient. Secondly, the fact that the confession itself is corroborated both by the documents that the man initialled and also by the testimony of at least four witnesses who came in and testified that they had dealt with Mr. Evans, Sr., that would be Mr. Myles Thomas, Samuel Huntley,

Timothy Brooks and Lea Gaddis, and finally I believe that Mr. Evans's signature does appear on several of the documents.

BY THE COURT: Well, Mr. Allred, the Defendants here are charged with mail fraud. Let me hear your evidence of how they were engaged in mail fraud?

BY MR. ALLRED: Your Honor, the indictment charges that they engaged in a scheme and artifice to defraud, and used the mails in pursuance of that scheme and artifice. One of the allegations in the scheme and artifice is that they did — the Defendants falsely and fraudulently stated and caused to be stated on applications for certificate of titles submitted to the Alabama Department of Revenue, the mileage of used vehicles purchased. That also charges that they took — the Defendants took all necessary actions to sell and convey ownership of titles to such automobiles, while knowingly and willfully concealing the fact that the odometers of such automobiles had been altered, and replaced and I would submit to the Court that the mailing was a furtherance of, and part of the scheme. The testimony as to the mailing was uncontradicted. That would be the testimony of Mr. Dillinger that they mailed the applications.

BY THE COURT: That was Mr. Dillinger of the finance company? How does his action of having mailed the certificate pertain to them? How is it a part of their scheme?

BY MR. ALLRED: Well, causing the mails to be used is my understanding of the law, particularly in the Fifth Circuit. The mails only have to be used incidentally in furtherance of the scheme. Obviously a title could not be issued without an application being made for it. The mailing of the application for title is the actual act that's charged in the indictment. I would submit that the material —

BY THE COURT: What I'm saying, the person who mailed the applications is Mr. Dillinger?

BY MR. ALLRED: That's right.

BY THE COURT: These Defendants never did any mailing, or what did they do with respect to any action of mailing?

BY MR. ALLRED: Well, I don't think they did an act themselves. This is an analogy to the Foshee case, and in this circuit, where the Fifth Circuit found the mailing by a bank of checks in the normal course of business in a mail kite – check kite fraud, that if the company could anticipate and reasonably foresee that a mailing took place and that it was part of and added to the scheme, then it was a mailing within the meaning of the statute.

BY THE COURT: So, what you're saying here, that the Defendant should have reasonably foreseen, number one, that Mr. Dillinger would take the information down, put it on the application, and that Mr. Dillinger would then mail the application to the State of Alabama?

BY MR. ALLRED: Yes, sir, that was a normal course of business, and particularly being in Alexander City, that would be something they could reasonably foresee. New titles to these automobiles had to be issued, and they could foresee the applications being mailed from Alexander City to Montgomery, and there is one other aspect, I suppose. The mailing question, and that's as to whether or not mailing is material, or whether or not it would have any effect, and of course I think the testimony of Mr. Harper with respect to their checking the titles and title applications and the odometer statements is sufficient as an aspect of this case.

BY MR. MORRIS: Your Honor, I appreciate the Court's wisdom, because that's probably – from where Mr. Evans, Sr. should have addressed that more strongly on the motion

to exclude. There is no testimony whatsoever that he could have reasonably foreseen, that he could have reasonably entered into any of the financial transactions. The only testimony is that this individual right here, basically was in charge of the business, and that's whose name it was in, and that —

BY THE COURT: You're saying Mr. Evans, Jr. could have reasonably foreseen that, and Mr. Evans, Sr. could not?

BY MR. MORRIS: Yes, sir, I don't argue with that, but they have not proved that we are in any way connected with Auto Center. It is not under our direction or control the right to cause something to be mailed. There is just no evidence, the evidence is devoid on Mr. Evans, Sr., and I agree with the Court's thinking, that Mr. Jr., who was in charge of this, could have reasonably foreseen it, but the duty is on the Government to make out something against Mr. Evans, Sr. on this mail fraud, and they have not touched on that, and they have rested.

BY THE COURT: All right, Court will be in recess for ten minutes.

(Short recess.

BY THE COURT: All right, Mr. Morris, I've considered your motions. With respect to Mr. Evans, Sr., your motion is denied.

# Supplemental Appendix

81-1948

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1981

EWELL WALTER EVANS, SR.,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

## APPENDIX B

JOE R. WHATLEY
JOHN C. FALKENBERRY

STEWART, FALKENBERRY & WHATLEY
2017 Morris Avenue
Birmingham, AL 35203
(205) 323-8300

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 81-7431
Non-Argument Calendar

---

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

versus

EWELL WALTER EVANS, SR.,

*Defendants-Appellant.*

---

Appeal from the United States District Court for the Middle District of Alabama

---

(November 25, 1981)

Before HILL, FAY and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

ISSUED AS MANDATE: MAR 15 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

81-7431

---

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

versus

EWELL WALTER EVANS, SR.,
*Defendant-Appellant.*

---

Appeal from the United States District Court for the Middle District of Alabama

---

O R D E R:

IT IS ORDERED that the Motion of Appellant For Leave to File Petition for Rehearing Out of Time is denied.

/s/ JOSEPH W. HATCHETT
U. S. CIRCUIT JUDGE

# Opposition

Office - Supreme Court, U.S.
FILED
MAY 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1943

# In the Supreme Court of the United States

OCTOBER TERM, 1981

EWELL WALTER EVANS, SR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES


Page

Cases:

*Kann* v. *United States*, 323 U.S. 88 ..... 3

*Parr* v. *United States*, 363 U.S. 370 ..... 3

*Simpson* v. *United States*, 435 U.S. 6 ..... 3

*United States* v. *Batchelder*, 442 U.S. 114 ..... 3

*United States* v. *Lovasco*, 431 U.S. 783 ..... 2

*United States* v. *Maze*, 414 U.S. 395 ..... 3

*United States* v. *Shryock*, 537 F. 2d 207, cert. denied, 429 U.S. 1100 ..... 2, 3

Statutes and rule:

15 U.S.C. 1984 ..... 3

15 U.S.C. 1990c ..... 3

18 U.S.C. 1341 ..... 1, 2, 3

Sup. Ct. Rule 20.1 ..... 1

Miscellaneous:

S. Rep. No. 94-155, 94th Cong., 1st Sess. (1975) ..... 4

# In the Supreme Court of the United States

OCTOBER TERM, 1981

---

No. 81-1943

EWELL WALTER EVANS, SR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

Petitioner contends that the evidence was insufficient to establish that the mailings in this case were "for the purpose of executing" his fraudulent scheme, within the meaning of the mail fraud statute, 18 U.S.C. 1341.[1]

1. After a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent prison terms of five years on each count. The court of appeals affirmed without opinion.

---

[1]The judgment of the court of appeals was entered on November 25, 1981, and the petition for a writ of certiorari was filed on April 15, 1982. Accordingly, the petition is out of time under Rule 20.1 of the Rules of this Court. Petitioner's untimely petition for rehearing to the court of appeals did not extend the time within which to file a petition for a writ of certiorari, because the court of appeals denied his motion for leave to file the rehearing petition out of time.

The evidence at trial showed that petitioner and his son, operators of a used car business in Alexander City, Alabama, regularly rolled back the odometers of vehicles and then sold them to the public (Tr. 127, 134, 136, 137).[2] Transouth Financial Corporation of Alexander City financed the purchases. To complete the transactions, Transouth prepared title applications on behalf of the purchasers and mailed the applications to the Motor Vehicle Division of the State of Alabama in Montgomery (Tr. 83-87). Each title application included the odometer reading of the vehicle at the time of the sale (*ibid.*).

2. Petitioner's claim that the mailing of the title documents was not "for the purpose of executing" his odometer rollback scheme, within the meaning of Section 1341, was not timely raised in the court of appeals (Pet. 2) and should not be considered for the first time in this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). In any event, the claim is without merit.[3]

The mailing of the title documents was central to the success of petitioner's scheme. See *United States* v. *Shryock*, 537 F. 2d 207 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977). To sell the cars, it was necessary to transfer title to the purchasers, and the transfer of title could not be completed until the title papers were transmitted to the State Motor Vehicle Division. Had petitioner been unable to transfer title to the purchasers, they would have been entitled to refunds of the purchase price of the vehicles. The mailings were, therefore, essential steps in the completion

---

[2]Petitioner's son and co-defendant was convicted on four counts of mail fraud.

[3]The issue whether the mailing of title documents brings an odometer rollback scheme within the coverage of Section 1341 is before this Court, on somewhat different facts, in *Galloway* v. *United States*, petition for cert., No. 81-1651 (filed Feb. 20, 1982).

of the scheme and thus more than "sufficiently closely related to * * * [petitioner's] scheme to bring his conduct within the statute." *United States* v. *Maze*, 414 U.S. 395, 399 (1974). See *United States* v. *Shryock, supra.*

Petitioner's invocation of *United States* v. *Maze, supra, Parr* v. *United States*, 363 U.S. 370 (1960), and *Kann* v. *United States*, 323 U.S. 88 (1944), is unavailing. In each of those cases—none of which involved the mailing of title documents or fraud in connection with the sale of a car—this Court held that the use of the mails did not advance the defendant's fraudulent scheme because the mailing occurred after the scheme had been completed. As we have explained, however, the success of petitioner's odometer rollback scheme was dependent on transfer of valid title, and transfer was effected by use of the mails.

Petitioner argues (Pet. 3) that Section 1341 is inapplicable because Congress has specifically addressed odometer tampering in another criminal statute, 15 U.S.C. 1990c.[4] When conduct violates more than one criminal statute and Congress has given no indication to the contrary, the government may prosecute under either statute. See *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979).[5] Nothing in Section 1990c suggests, and petitioner has cited nothing from its legislative history to indicate, that Congress intended to preclude prosecutions for violations of Section 1341 when an odometer rollback scheme is carried out by use of the mails. Indeed, the legislative history indicates that the purpose of Section 1990c was to provide

---

[4]Section 1990c makes it a misdemeanor for a person to "disconnect, reset, or alter * * * the odometer of any motor vehicle with intent to change the number of miles indicated thereon," in violation of 15 U.S.C. 1984.

[5]Indeed, petitioner could have been prosecuted and punished for violation of both statutes. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11 (1978).

"*additional* enforcement powers and sanctions" against odometer-tampering (emphasis added). S. Rep. No. 94-155, 94th Cong., 1st Sess. 6 (1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

MAY 1982

DOJ-1982-05